
CHAMBERS GLOBAL PRACTICE GUIDES

Climate Change Regulation 2023

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Italy: Law & Practice

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ITALY



Law and Practice

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Ambientalex Studio Legale has offices in Rome, Milan and Florence and specialises in the various sectors of environmental and energy law. The firm's teams deal with cutting-edge environmental law issues, including climate change practice, taking into consideration environmental legislation about to be issued. It advises Italian and foreign multinationals, NGOs and trade associations aiming to be compliant with environmental legislation; clients also include

other law firms. The dedicated climate change team is composed of one partner and two associates. Where requested, and depending on the practice areas concerned (ie, waste, environmental permits, contaminated sites, etc), the team may also include other experts and/or external technical consultants with proven experience. Business is conducted in Italian, English, German and French.

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1. Multilateral and Regional Regimes

1.1 Multilateral Climate Change Legal Regime

Italian Participation in the Multilateral Climate Change Legal Regime at Both the National and EU Level

Italy participates in the multilateral climate change legal regime both individually and as a member of the European Union (EU), which acts as a negotiating bloc.

Individually, Italy is an Annex 1 party to the United Nations Framework Convention on Climate Change (UNFCCC). It ratified the Kyoto Protocol with Act No 120 of 1 June 2002 and the Paris Agreement with Act No 204 of 4 November 2016.

Through its competent ministries, Italy responds to its commitments through the conclusion of international agreements at a bilateral and multilateral level.

Regarding the areas of interest for the conclusion of agreements, it should be noted that, traditionally, Italian foreign policy has oriented its co-operation and development work, including on climate issues, towards the Mediterranean and Africa. Decree Law No 92/2021 established the new role of the Special Envoy for Climate Change to ensure more effective Italian participation in international events and negotiations on environmental issues.

Regarding Italy's membership of the EU, the latter often does not speak with one voice due to the tendency of some EU member states to speak only for themselves. In addition, a strategy capable of anticipating global discussions is often lacking.

Looking at the Italian position, as expressed since the 2015 Paris Agreement, the government's actions are geared towards ensuring active participation in the completion of the process for defining the technical rules needed to make the Paris Agreement fully operational, and towards pushing for these policies.

Mitigation

The report prepared by Italy's Institute for Environmental Protection and Research (ISPRA) (see **2.4 Key Policy/Regulatory Authorities**) highlights that 2021 was the sixth hottest year on record. In Italy, it was the 14th hottest year since 1961, recording an average anomaly of +0.23°C compared to the period 1991–2020. In accordance with this data, Italy's political agenda on mitigation has been geared towards reconfirming and reinforcing its climate action plan to cut emissions and adapt to climate impacts – ie, its Nationally Determined Contribution (NDC).

Adaptation

The government wishes to increase its adaptive capacity, strengthening the resilience of territories, especially through existing internal sectoral planning.

Climate Finance

Since 2015, Italy's climate finance has been evenly split between mitigation and adaptation objectives. In particular, as reported in the Biennial Report of the United Nations Framework Convention on Climate Change (UNFCCC), 48% of Italian climate finance has been allocated to mitigation, and 52% to adaptation.

The Decree of 21 October 2022, published on 14 February 2023 in the Official Journal of Italy, established the rules for the Italian Climate Fund, promoted by the Ministry of the Environment and Energy Security (MASE) and managed by Cassa

Depositi e Prestiti. It has a total endowment of EUR4.2 billion and aims to promote measures to adapt to and combat climate change in those countries identified by the OECD Development Assistance Committee – the so-called partner countries.

Capacity Building

Since 2017, Italy has been promoting a capacity-building programme with the Alliance of Small Island States (AOSIS) aimed at developing negotiation and policy analysis capacities in multi-lateral negotiations with a particular focus on issues of interest to the small-island developing states, such as oceans, climate change, sustainable development and the implementation of the Paris Agreement and Agenda 2030. On 28 October 2021, a two-year Protocol of Intent was signed between the Italian Minister and AOSIS to strengthen the programme.

Technology Transfer

The issue of technology transfer seems not to be at the top of the Italian political agenda. However, Italy has joined the “Breakthrough Agenda” launched at the COP 26 World Leaders Summit, which calls for countries to commit to working together over the next decade to accelerate the development and deployment of clean technologies and sustainable solutions to achieve the goals of the Paris Agreement.

1.2 Regional Climate Change Legal Regimes

Italy, as a member state of the EU, participates in the drafting of EU policies for combating climate change.

In fact, EU Treaties, in particular Article 191 of the Treaty on the Functioning of the European Union (TFEU), identify “combating climate change” as an important objective of EU policy.

Competence in this area is shared between the member states and the EU.

The European Green Deal

The new European Commission’s political guidelines place climate action at the top of its agenda, in particular with the European Green Deal, announced on 11 December 2019.

The objective of the European Green Deal is to make Europe the world’s first climate-neutral continent. To accomplish this, a number of regulatory proposals have been adopted to ensure that several production sectors will be able to meet the target.

In this context, Italy has (in particular) taken a position on decarbonisation, believing that it should be pursued in an effective but progressive manner. Additionally, Italy has always stressed the importance of a European industrial strategy, emphasising the need to avoid underestimating the potential impact of the climate-neutrality goal on European society. To ensure the achievement of a smooth transition, it would be necessary for Italy to invest in a number of technologies, including:

- sustainable transport systems;
- systems for hydrogen storage, distribution and accumulation;
- wave and marine energy;
- decarbonisation;
- circular and bio-based economic solutions; and
- transparent asset renovation for intensive energy sources.

The National Recovery and Resilience Plan (NRRP)

The aforementioned sectors are also involved in the funding under the NRRP. This programme

has set aside an amount of EUR59 billion for Mission No 2 (green revolution and climate change mitigation/adaptation objectives). In absolute figures, Italy's NRRP is the largest national plan under the unprecedented EU response to the crisis triggered by the COVID-19 pandemic. On 30 December 2022, Italy submitted its third payment request to EU Commission within the NRRP.

In 2021, the government's action at the EU level was aimed at facilitating EU negotiations on the proposed Regulation on the "European Climate Act" for the definition of ambitious, fair and equitable climate targets (including the revision of the 2030 target). The Regulation was finally adopted at first reading by the Council on 29 July 2021.

The Mediterranean Area

At present, within the framework of transnational inter-regional co-operation (such as the Interreg EURO-MED programme or other forms of co-operation), adaptation strategies and plans have not been developed for the Mediterranean area. It would be necessary for Italy to assume a new role in the Mediterranean area for co-operation in the actions necessary to tackle climate change, considering that due to its geographical position Italy is exposed both to direct impacts and to the consequences of these impacts in countries on the Mediterranean's southern shores.

2. National Policy and Legal Regime (Overview)

2.1 National Climate Change Policy

Italy's national climate change policy is determined by the multilateral and regional EU regime. In particular, the EU regime sets out the objectives, standards and key strategies of the national legislation according to the evidence

of climate change science. The Joint Research Centre of the EU Commission operates in the context of the international programmes, such as the Intergovernmental Panel on Climate Change (IPCC), among others. It supports the EU's aim of addressing, mitigating, monitoring and adapting to the effects of climate change. Moreover, at a national level, in October 2022 the Ministry of Environment and Energy Security (MASE), in collaboration with the Institute for Environmental Protection and Research (ISPRA), launched the National Platform on Adaptation to Climate Change, a website aimed at informing and raising awareness among citizens and stakeholders on the issue of adaptation and making available data and tools useful for supporting public administration in decision-making processes.

Since ratifying the Paris Agreement, the EU block has enacted an ambitious, binding, legislative framework for delivering on its initial NDC, transmitted by the EU Council on 18 December 2020. The combined effect of the EU policies currently in force and the national implementation of EU policies should at least deliver the reductions pledged in the EU's initial NDC.

With the passing of the NDC, the EU and its member states committed to an economy-wide net reduction from base-year emissions of at least 55% of greenhouse gases (GHGs) by 2030, compared to 1990 levels. At the Sharm El-Sheikh Climate Change Conference (COP 27) it was announced that the NDC's 55% target will be raised by two percentage points.

EU Climate Change Legislation

As part of the Internationally Transferred Mitigation Outcomes policy, the emissions reduction targets under current EU legislation are divided between those sectors covered by the EU Emis-

sions Trading System (EU ETS), non-ETS sectors and the Effort Sharing Regulation (ESR). The EU has adopted several legislative and policy acts in order to guarantee these ambitious emissions reduction targets. The key pieces of legislation are as follows.

- Directive 2003/87/EC, as last amended by Directive (EU) 2018/410, on reductions to be achieved in the sectors covered by the EU ETS – on the basis of this Directive, the EU will reduce its emissions by 43% from 2005 levels by 2030.
- Regulation (EU) 2018/842, as last amended by Regulation (EU) 2023/857, on binding annual GHG emissions reductions by member states from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement – this Regulation establishes that each state will reduce its emissions from sectors outside the EU ETS compared to 2005 levels by 2030 in accordance with a certain percentage. This is 43.7% in the case of Italy according to the amendments approved in order to implement the commitments laid down in Regulation (EU) 2021/1119.

In fact, through the adoption of Regulation (EU) 2021/1119, the EU establishes a binding Union domestic reduction target for net greenhouse gas emissions of at least 55% compared to 1990 levels by 2030, in order to achieve climate neutrality by 2050.

Transparency Framework

The current EU reporting framework on climate finance is based on Regulation (EU) 525/2013 and the subsequent Regulation (EU) 2018/1999 establishing a mechanism for monitoring and reporting GHG emissions and for reporting other information relating to climate change. Member states are required to submit annual reports on

financial support, capacity building and technology transfer activities to developing countries, based on the best available data.

Adaptation

In the new EU Strategy on Adaptation to Climate Change of 24 February 2021, the European Commission sets out how the EU can adapt to the unavoidable impacts of climate change and become climate-resilient by 2050, showing its intention to increase support for international climate resilience in negotiations in order to ensure that climate change adaptation and loss and damage issues are adequately addressed in international negotiations.

Technology Transfers and Climate Finance

The EU Commission adopted an action plan on sustainable finance in March 2018. The action plan sets out a comprehensive strategy to further connect finance with sustainability through two main policies.

- Reorienting capital flows towards a more sustainable economy (ie, Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment; the European Green Deal Investment Plan implemented through various programmes such as Horizon Europe, Life funds, Cohesion Funds; etc).
- Integrating sustainability into risk management (ie, Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector; the Guidelines on Disclosure Requirements Applicable to Credit Ratings by ESMA; etc).

Carbon Market

In addition to the EU ETS, within the “Fit for 55” legislative package the new Regulation (EU) 2023/956 of the European Parliament and of

the Council of 10 May 2023 aims to achieve the objective of a climate-neutral Union by 2050 at the latest, in line with the Paris Agreement, by addressing the risk of carbon leakage through a carbon border adjustment mechanism (CBAM).

In Italy, this legislation has been transposed into national laws, plans and administrative decisions (see **2.2 National Climate Change Legal Regime**; **3. National Policy and Legal Regime (Mitigation)**; **4. National Policy and Legal Regime (Adaptation)** and **5. Responses to International Developments**).

2.2 National Climate Change Legal Regime

The environmental legal framework is mainly (but not only) set forth by Legislative Decree No 152/2006 (also known as the “Environmental Consolidated Act” – ECA).

However, the ECA does not provide a specific discipline on combating climate change. The principal legislation directly relating to climate change is as follows.

- Legislative Decree No 111/2019 (also known as the “Climate Decree”) – this is mainly aimed at adopting urgent measures for the definition of a national strategic policy for combating climate change and improving air quality. In addition to the measures and actions for different sectors, according to Article 1(2) of the Decree, each public administration should conform to the activities within its competence for the achievement of those objectives.
- Legislative Decree No 47/2020, which transposes Directive (EU) 2018/410 on emissions trading into Italian law (see **3. National Policy and Legal Regime (Mitigation)**).

- The Budget Laws, which set out funds for combating climate change (ie, the 2022 Budget Law – Law No 234/2021 established the new Italian Climate Fund, with a budget of EUR840 million for each of the years 2022 to 2026 and EUR40 million from 2027 onwards).
- Various laws relating to the planning of activities to meet – specifically – the target of the reduction of GHG emissions (ie, the Integrated National Energy and Climate Plan in accordance with Regulation (EU) 2018/1999; the Ecological Transition Plan pursuant to Article 57 bis of the ECA; the National Action Plan for the reduction of GHG emission levels, required by the Kyoto Protocol ratification No 120/2002; etc).

Recognition of Environmental Protection in the Italian Constitution

Constitutional Law No 1/2022 amended Articles 9 and 41 of the Italian Constitution, expressly introducing environmental protection to the constitutional values. Previously, environmental protection had already been acknowledged by the Constitutional Court by means of interpretation of the constitutional principles on the protection of landscape required by Article 9(2) and on human health, as established by Article 32(1) of the Italian Constitution.

Furthermore, the constitutional review resulted in a new reference to the principle of sustainable development, contained in Article 9(3) of the Constitution. Indeed, Article 9(3) of the Constitution now states that the Republic “protects the environment, biodiversity and ecosystems, also in the interests of future generations. State law regulates the types and forms of animal protection”.

2.3 Bilateral Co-operation

According to the information available, there are 38 active bilateral co-operation agreements with other Paris Agreement country parties for ensuring the implementation of climate change policy action. Most of the agreements are signed with African states, and cover the promotion of renewable energy sources and energy access in remote areas of the country and the adaptation of populations to climate change.

There is no public data regarding formal bilateral agreements under Article 6.2 of the Paris Agreement.

2.4 Key Policy/Regulatory Authorities

The following are the key policy, administrative, governance and regulatory authorities in Italy.

Ministry of Environment and Energy Security (MASE)

The governmental body in charge of environmental policies is the Ministry of Environment and Energy Security (*Ministero dell'Ambiente e della Sicurezza Energetica* – MASE). It is also responsible for issuing policy on climate change.

The MASE is formed of different Directions, such as the General Direction on European and International Activity (*Direzione Generale attività europea e internazionale* – DG AEI). The third division of the AEI is dedicated to “international strategies for sustainable development and the climate” and participates in all activities proposed by international authorities for combating climate change. It also supports the actions of the Special Envoy for Climate Change.

Institute for Environmental Protection and Research (ISPRA)

The MASE has a policy and supervisory role over the activities of the Institute for Environmental

Protection and Research (*Istituto Superiore per la Protezione e la Ricerca Ambientale* – ISPRA). ISPRA is part of the National Network System for the Protection of the Environment (*Sistema Nazionale di Protezione dell'Ambiente* – SNPA), together with the Regional Agencies for the Protection of the Environment (*Agenzie Regionali per la Protezione dell'Ambiente* – ARPAs). As regards climate change, ISPRA's tasks include issuing and updating climate statistics and indicators in Italy, and drawing up the emissions inventory, which is essential for verifying compliance with international climate targets.

ETS Committee

Regarding regulatory authorities, an important role is played by the competent national authority for the implementation of the ETS. The ETS Committee is an inter-ministerial body composed of the MASE and the Ministries of Economic Development and Infrastructure, established by Legislative Decree No 216/2006.

Inter-ministerial Committee for Economic Planning and Sustainable Development (CIPESS) and Inter-ministerial Committee for Ecological Transition (CITE).

The CIPESS aims at updating the National Plan for the reduction of GHG emissions. Since October 2019, this Committee has been renamed by referring to sustainable development. Previously, it was known as the Inter-ministerial Committee for Economic Planning.

The CITE is responsible for approving the Plan for Ecological Transition and has the task of coordinating national policies and all related plans.

Both the CIPESS and the CITE are composed of the President of the Council Ministers and the competent ministries.

3. National Policy and Legal Regime (Mitigation)

3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors National Policy

The aim of climate change mitigation is spread throughout national regulation. However, the main instruments specifically dealing with climate change mitigation, and guaranteeing the NDC mitigation targets, are within the ETS.

Other important instruments are set forth by the NRRP. Mission 2 provides for significant investments to promote the green revolution in the pursuit of climate change mitigation and adaptation goals.

Emissions Trading System

As mentioned in **2.1 National Climate Change Policy**, the overall volume of GHG is limited by a “cap” on the number of emissions allowances for power plants, industry factories and the aviation sector, on the basis of the EU ETS regulated by Directive 2003/87/EC as amended by Directive (EU) 2018/410. This cap on emissions is set for the whole of the EU. Since the beginning of Phase 3 of the EU ETS (2013–20) and in Phase 4 of the EU ETS (2021–30), the cap on emissions has decreased by an annual linear reduction factor of 2.2%, as established by Directive (EU) 2018/410.

Legislative Decree No 47/2020 transposes the ETS into Italian legislation. According to Article 24 of said Legislative Decree, the ETS Committee (**2.4 Key Policy/Regulatory Authorities**) should set out the number of allowances to be allocated free of charge in that period based on EU law; the other allowances must be paid. Indeed, within the cap, installations buy or receive emissions allowances, which they can

trade with one another as needed. All revenues generated from the auctioning of allowances is paid into a dedicated government account.

Under Article 35 of said Legislative Decree, the operators must file an annual report of emissions by 31 March to the ETS Committee. In the case of a breach of the ETS rules, Article 42 provides penalties according to EU ETS legislation.

Spheres of Government/Sectors Affected

2.4 Key Policy/Regulatory Authorities includes a discussion of the spheres of government affected. Sectors affected by the ETS include aviation and other activities listed in Annex I of Legislative Decree No 47/2020 (as well as those of Annex I of Directive (EU) 2018/410). As indicated by the Ministry of Enterprises and Made in Italy, currently more than 1,200 entities are regulated by Legislative Decree 47/2020, covering about 40% of national GHG emissions. Therefore, as a main consequence, those operators are also required to include in their business risk any emissions-related costs for the allowances market.

Climate Change Mitigation in the Granting of Environmental Permits/Authorisations

At the EU level, in 2013 the EU Commission presented the “Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment” and the “Guidance on Integrating Climate Change and Biodiversity into Strategic Environmental Assessment” to help member states improve the way in which climate change is integrated into environmental impact assessments (EIAs) and in strategic environmental assessments (SEAs), carried out across the EU.

The subsequent Directive (EU) 2014/52, amending Directive (EU) 2011/92, strengthened the

provisions related to climate change in the EIA legislation.

In accordance with EU Directives, the Italian EIA legislation, as transposed by Part II and relevant Annexes of the ECA, considers both mitigation and adaptation to climate change. Pursuant to Article 5 and Annex VII of the ECA, the developer should also include the “impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change in the environmental impact assessment report”.

The SNPA has elaborated the Guidelines on technical standards for the preparation of the environmental impact report (Linee Guida SNPA No 28/2020, ISBN 978-88-448-0995-9, Rome, May 2020). Annex 2 of the Guidelines contains an in-depth focus on mitigation and adaptation to climate change.

However, SEA legislation (see Part II and relevant Annexes of the ECA) does not contain express reference to climate change and its mitigation, but only considers generic “climatic factors”.

For the environmental authorisations issued by administrations, climate mitigation is considered among the general objectives and also concerns the provision of measures, including compensatory measures.

All measures included in the NRRP must respect the “do no significant harm” (DNSH) principle. According to this, the measures should not cause significant harm to the environmental objectives set out in Article 17 of Regulation (EU) 2020/852 “Taxonomy for Sustainable Finance”. The objectives include climate change mitigation, also impacting on authorisations and permits.

4. National Policy and Legal Regime (Adaptation)

4.1 Policy/Regulatory Instruments and Spheres of Government/Sectors National Policy

In Italy, the national climate change policy is based on the following key strategies and plans.

- Directorial Decree No 86 of 16 June 2015 approved the “National Strategy on Adaptation to Climate Change”. In 2013, the adoption of the “European strategy on adaptation to climate change” was the catalyst for European countries to develop a national strategy in this respect. The main objective of the Italian National Strategy has been to develop a national vision on how to deal with the impacts of climate change on the Italian system.
- The “Climate Change Adaptation Plan”, for which the Strategic Environmental Assessment is ongoing, aims at implementing the National Strategy by updating and better specifying its contents for operational purposes. For example, it includes sectorial adaptation measures for the various natural resources involved.
- Under Article 57 bis of the ECA, by a Resolution dated 28 July 2021, the Ecological Transition Plan has been approved by the Inter-ministerial Committee for Ecological Transition. The purpose of the Plan is to guarantee the co-ordination of environmental policies also for climate mitigation and adaptation considering the number of different legislative initiatives involved.

Another important instrument is set forth by the NRRP. Mission 2 of the NRRP provides for significant investments to promote the green

revolution and climate change mitigation and adaptation goals.

Spheres of Government/Sectors Affected

2.4 Key Policy/Regulatory Authorities includes a discussion of the spheres of government affected. Regarding those sectors affected by the regulatory framework, in August 2021 Italy launched the first experimental programme of interventions for adaptation to climate change in urban areas, aimed at increasing the resilience of urban centres to risks generated by climate change, with reference to heat waves, extreme rainfall and drought. This experimental programme allocated about EUR80 million for the implementation of green and blue infrastructures in urban areas, as well as grey adaptation measures. Furthermore, the investments based on the NRRP aim at affecting several sectors, such as sustainable mobility, renewable energy, energy efficiency (of private and public buildings), the circular economy, management of water and waste, as well as hydrogeological risks.

Climate Change Mitigation in the Granting of Environmental Permits/Authorisations

As explained in **3.1 Policy/Regulatory Instruments and Spheres of Government/Sectors**, the IEA and the SEA also take into account adaptation to climate change in environmental authorisations. Regarding the SEA, the “Guidelines for the analysis and characterisation of environmental components to support the assessment and drafting of SEA documents” (ISPRA, No 148/2017, ISBN 978-88-448-0813-6) suggest considering the national climate adaptation strategy in the planning activity related to the SEA.

5. Responses to International Developments

5.1 Carbon Markets

The Italian jurisdiction intends to participate in the carbon market evolving under Article 6 of the Paris Agreement. This was a central discussion point at COP26 in Glasgow, in which Italy and the EU participated in order to facilitate agreement on the Article 6 Rulebook.

It may be assumed that the most relevant future developments will concern:

- the EU ETS, which will be extended to other sectors such as maritime, construction and road transport; and
- the implementation of the Carbon Border Adjustment Mechanism (CBAM) (please see **5.2 European Union Carbon Border Adjustment Mechanism (CBAM)**).

Regarding participation in the voluntary carbon market (VCM), at present there are two mechanisms set up under the Kyoto Protocol – the Clean Development Mechanism and the Joint Implementation – in which Italy has taken part. In any event, since Phase 3 of the EU ETS (2013–20), the international credits generated by those mechanisms are no longer compliance units within the EU ETS. One of the consequences of this EU policy was registered by the “State of the Voluntary Carbon Markets 2021”. This report, produced by the non-profit initiative “Ecosystem Marketplace”, stated that since Europe stopped accepting offsets in its EU ETS compliance scheme, prices of European origin credits sold in the VCM have fallen to almost USD3 per tonne, although prices increased significantly in 2020 to almost USD9.50 per tonne in the general market.

The Italian jurisdiction does not intend to introduce domestic regulation of the carbon markets. Actually, Italian legislation constitutes the transposition of the EU legislation into the domestic legal order. In particular, Legislative Decree No 47/2020 has transposed Directive (EU) 2018/410 amending Directive 2003/87/EC to enhance cost-effective emissions reductions and low-carbon investments.

5.2 European Union Carbon Border Adjustment Mechanism (CBAM)

The governing regulations have been set out at the EU level. On 10 May 2023, Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism (CBAM) was adopted.

The Italian jurisdiction will be highly affected by the EU's new CBAM Regulation. It can be assumed that the CBAM will progressively become an alternative to the ETS. The CBAM Regulation aims at extending carbon pricing to products made in countries that do not have carbon pricing mechanisms, exactly as if that product had been made in Europe and within the ETS. At first, the CBAM will only apply to a selected number of goods at high risk of carbon leakage – iron and steel, cement, fertiliser, aluminium and electricity generation – to be gradually extended to other goods.

According to Dossier No 61 of 18 February 2022, prepared by the Italian Chamber of Deputies, Italy is one of the member states with the highest percentage of imports in the CBAM sectors, with 26.6% for steel, 3.7% for cement, 7.3% for fertilisers and 19% for aluminium. Considering that, it can be assumed that this may cause an increase of the prices of imported goods belonging to the categories subject to the CBAM Regulation.

6. Liability for Climate Change and ESG Reporting

6.1 Task Force on Climate-Related Financial Disclosures (TCFD)

As regards national policy, the TCFD has scarcely influenced the Italian legal system. Instead, this has occurred mainly via EU law. In 2017 the TCFD issued its first recommendations, which were implemented by the European Commission via the “Guidelines on non-financial reporting” (Communication 2017/C 215/01). Regulation (EU) 2019/2088 (the “Sustainable Financial Disclosure Regulation” – SFDR) and Regulation (EU) 2020/852 (the “Taxonomy Regulation”) may be considered as (indirect) implementations of such non-binding tools. It is noteworthy that EU institutions have implemented TCFD recommendations through regulation – ie, self-executing acts.

Prior to such recommendations and regulations, EU co-legislators issued the Non-financial Reporting Directive (EU) 2014/95 (NFRD), amending Directive (EU) 2013/34 (the “Accounting Directive”) which has been transposed into Italian legislation by Legislative Decree No 254/2016. Recently, Commission Delegated Regulation (EU) 2021/2178 (the “Disclosure Delegated Act”), supplementing the Taxonomy Regulation, specified the content and presentation of the information to be disclosed pursuant to the Accounting Directive Articles 19a and 29a, both introduced by Article 1 of the NFRD.

At the regulatory level, Italian institutions have appeared more prompt to embrace TCFD guidelines autonomously.

For instance, the National Institute for the Supervision of Insurance (*Istituto per la Vigilanza sulle assicurazioni* – IVASS) issued Regulation No 38/2018 on the system of governance of insur-

ance undertakings and groups. Regulation No 38/2018, among other provisions, aims at rationalising the existing regulatory framework; it also introduced new provisions relating to social and environmental factors in the definition of the strategic plan and the activities of insurance undertakings. In particular, Article 4(2) establishes that the controls relating to the corporate governance system shall cover each type of corporate risk, including those of an environmental and social nature, “generated or borne”. Article 47(2)(b) also stipulates that those undertakings may introduce remuneration systems, for the variable component, based on non-financial indicators, such as criteria based on social and/or environmental performance or the management of customer service.

Further, on 1 March 2021, the National Commission for the Supervision of Financial Markets (*Commissione Nazionale per le Società e la Borsa – CONSOB*) issued a press release declaring support of and compliance with TCFD recommendations. Similarly, in its Occasional Paper No 744/2022, “ESG disclosure: regulatory framework and challenges for Italian banks”, the Bank of Italy made copious references to TCFD recommendations.

It is difficult to assess the impact of the influence of civil society on investment and industrial operational decisions. However, according to the Bank of Italy’s Occasional Paper No 545/2020, so far there has been little growth in awareness of the risks linked to climate change and the opportunities linked to the transition towards a low-carbon economy.

6.2 Directors’ Climate Change Liability Broad Climate Change Liability

Italian legislation does not provide for a specific form of liability related to the impacts of climate

change. National legislation only includes some provisions, relating either to civil/administrative or criminal liability in cases of significant adverse impacts on certain natural resources (respectively, liability for environmental damage and for environmental criminal offences).

The Environmental Liability Directive 2004/35/EC (ELD) was transposed into national legislation by the ECA (see Articles 298-bis–318). “Environmental damage” means a measurable adverse effect on:

- protected species and natural habitats;
- water, including marine waters; and
- land (Article 300 ECA).

On the other hand, pursuant to Criminal Code Articles 452-bis and ff the scope of environmental criminal liability is broader, since the criminal offences provided therein also encompass harm to air and ecosystems.

Environmental liabilities for damages as well as for criminal offences are thus not specifically referred to in climate change legislation. That said, both may be deemed as protecting some of the natural resources encompassed by climate change legislation.

Civil Liability

As regards directors’ liability for the impact on climate change of their companies, the ordinary provisions of the Italian Civil Code shall apply. Pursuant to Civil Code Articles 2392 and 2476, companies’ directors may be held liable for negligence in complying with their (occupational) duties. Therefore, directors may only be convicted for the negative impact their companies have on climate change where such impact results from negligence.

Pursuant to ECA Article 311(2), operators may be held liable for environmental damage. ECA Article 302(4) provides for a broad definition of “operator”. It encompasses “any natural or legal, private or public person who operates or controls the occupational activity having environmental significance or to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity”. Directors, often jointly with the company, may thus be held liable pursuant to the ECA (Articles 298-bis and ff), where the above-mentioned requirements provided for by Civil Code Articles 2392 and 2476 are met.

Criminal Liability

Criminal environmental liability is strictly personal. Traditionally, legal entities shall not be held liable for criminal offences (*societas delinquere non potest*); only directors, or the other natural person who took the relevant decision(s), shall be held liable for criminal offences committed by the company. However, under Legislative Decree No 231/2001, even legal entities, where they are not able to demonstrate that specific organisational measures have been adopted, may be held liable for a number of criminal offences (including environmental offences) committed in their interest or to their advantage by their directors or by another natural person exercising, even de facto, management and control over them.

Infrastructure investments and/or financing arrangements capable of producing negative climate change impacts may become relevant under corporate social responsibility (CSR) law. Legislative Decree No 231/2001 embodies a CSR instrument, as it pushes companies to adopt organisational measures to prevent the commission of certain criminal offences, includ-

ing environmental offences (even though these are not criminal offences specifically related to climate change).

However, at a national and supranational level, the climate change CSR trend seems to have an enabling, rather than punitive, approach. Regulatory authorities are thus focused on promoting positive (or non-negative) effects, rather than on sanctioning negative climate change effects. An example of this approach is the non-financial reporting obligation (see 6.1 Task Force on Climate-Related Financial Disclosures (TCFD) and 6.4 Environmental, Social and Governance (ESG) Reporting and Climate Change). Furthermore, ISO standards on CSR have been available since 2010. The International Organization for Standardization (ISO) has published a technical standard (26000) on CSR which deals with climate mitigation and adaptation.

6.3 Shareholder or Parent Company Liability

For environmental civil liability (ECA Articles 298-bis and ff), shareholders and parent companies may be held liable where:

- they fall within the definition of “operator” provided for by ECA Article 311(2) and (b); and
- their conduct causes environmental damage pursuant to ECA Article 300.

Under the Civil Code, shareholders may only be held liable for damages caused by the company pursuant to ECA Articles 298-bis and ff where they are unlimitedly liable for the acts of the company (ie, where that company is a partnership). For criminal environmental offences, shareholders may be held liable where their personal conduct constitutes a criminal offence, in

accordance with the principle of personal criminal liability.

For parent companies, pursuant to Civil Code Article 2497-ter, every decision taken by the subsidiary company in accordance with the parent company's directives should be analytically motivated and contain precise indications of the reasons and interests whose evaluation affected the decision. Consequently, in so far as it is ascertained that the environmental damage caused by the subsidiary company was due to a directive from the parent company, the latter may be held liable. Similarly, in the case of an environmental criminal offence caused by a subsidiary company due to a directive from a parent company, even the latter may be held criminally liable pursuant to Legislative Decree No 231/2001.

6.4 Environmental, Social and Governance (ESG) Reporting and Climate Change

The Non-financial Reporting Decree

Legislative Decree No 254/2016 (the "Non-financial Reporting Decree" or "NFR Decree") has transposed into Italian legislation the Accounting Directive (EU) 2013/34, as amended by the NFRD. In particular, Articles 2, 3 and 4 of the NFR Decree enact Articles 19a and 29a of the Accounting Directive, both introduced by Article 1(1) and (3) of the NFRD.

Pursuant to NFR Decree Article 2, public-interest entities that average over 500 employees during the financial year and a balance sheet total of EUR20 million and/or a net turnover of EUR40 million should include a non-financial statement in the management report.

In order to determine whether ESG reporting falls within such a regulatory requirement and wheth-

er it includes a climate change component, a number of normative acts should be examined.

NFR Decree Article 3(1) provides that the statement should cover environmental, social and governance (ESG) issues describing, at least:

- the undertaking's business and organisational model;
- the policies pursued by the undertaking in relation to those matters, including implemented due diligence processes; and
- the principal risks related to those matters linked to the undertaking's operations, including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks.

Article 3(2) specifies the information related to ESG matters. For the environmental matters, the non-financial statement should include information on:

- the renewable and non-renewable energy resources used, as well as the use of water resources;
- GHG and polluting emissions; and
- the impacts on environment and human health.

NFR Decree Article 4 provides a similar provision for public-interest entities' parent companies as referred to in NFR Decree Article 1(1)(b).

The Taxonomy Regulation

Even though the provision includes just some of the components related to climate change, NFR Decree Articles 2, 3 and 4, as enacting Accounting Directive Articles 19a and 29a, should be read in light of Regulation (EU) 2020/852 (the

“Taxonomy Regulation”) and the pertinent delegated acts progressively issued by the European Commission pursuant to it.

Taxonomy Regulation Article 8(1) provides that any undertaking subject to an obligation to publish non-financial information pursuant to Accounting Directive Articles 19a or 29a “shall include in its non-financial statement or consolidated non-financial statement information on how and to what extent the undertaking’s activities are associated with economic activities that qualify as environmentally sustainable under Articles 3 and 9 of this Regulation”. In accordance with Taxonomy Regulation Article 8(4), the Commission issued the Disclosure Delegated Act 2021/2178, aimed at specifying the content and presentation of the information to be disclosed pursuant to Article 8(1).

Taxonomy Regulation Article 9 lists six environmental objectives, including climate change mitigation and climate change adaptation. Articles 10 and 11 provide the general conditions under which an economic activity shall qualify as contributing substantially to climate change mitigation and adaptation, respectively. Such conditions have been specified, by establishing pertinent technical screening criteria, within Delegated Regulation (EU) 2021/2139 (the “EU Taxonomy Climate Delegated Act”) adopted by the European Commission pursuant to Articles 10(3) and 11(3).

Definition of Public-Interest Entities

As regards the subjective scope of application of these requirements, ESG reporting is a requirement for stock-exchange listing. NFR Decree Article 1(a), in fact, identifies public-interest entities as those legal persons referred to by Legislative Decree No 39/2010 Article 16(1):

- Italian companies whose transferable securities are admitted to trading on an Italian or EU regulated market;
- credit institutions;
- insurance undertakings; and
- reinsurance undertakings.

7. Transactions

7.1 Due Diligence

Unlike France or Germany, Italy has not implemented any specific legislation on environmental due diligence.

The Bank of Italy’s Occasional Paper No 545/2020 has highlighted that, so far, there has not been adequate growth in the awareness of the risks linked to climate change and the opportunities linked to the transition towards a low-carbon economy. This means that, even at a transaction level, climate-related financial risk (CRFR) disclosure is still unsatisfactory.

However, such phenomena are not limited to Italy, as demonstrated by the recent European Commission Communication COM (2022) 71 final, “Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937”. The Commission declared that voluntary action does not appear to have resulted in large-scale improvement across multiple sectors, and has therefore elaborated on a compulsory instrument. The proposal concerns adverse effects on human rights and environmental impacts, including in the relevant undertaking’s value chains. As to environmental concerns, adverse impacts include, in particular, GHG emissions, pollution, biodiversity loss and ecosystem degradation. The proposal aims to introduce proper climate change due diligence.

At a national level, companies conducting environmental due diligence currently concerns general environmental legislation. To such extent, not every component is to be considered as strictly related to climate change. Typically, climate change-related issues may include:

- IPPC/industrial emissions permits;
- environmental impact assessment/strategic environmental assessment;
- air pollution, brownfield sites, waste, etc; and
- renewable energy/energy efficiency.

8. Climate-Friendly Investment Support

8.1 Renewable Energy Renewable Energy Policy

At a policy level, the government, in accordance with the Italian Integrated National Energy and Climate Plan (PNIEC), is committed to a new approach in resource and environmental management with a focus on aspects of energy security, self-production and consequent resilience. Consistent with its commitment to reduce GHG emissions by 2030, Italy is committed to a transition towards renewable energy sources (including biofuels and hydrogen), to the energy efficiency of its infrastructure and to the adoption of smart technologies aimed at energy efficiency and resilience in a cybersecurity framework.

The PNIEC is structured into five lines of action, which will be developed in an integrated manner: from decarbonisation to energy efficiency and security, through to the development of the internal energy market, research, innovation and competitiveness. The goal is to create a new energy policy that ensures the full environmental, social and economic sustainability of the national territory.

Renewable Energy Legislation

The main piece of legislation for renewable energy is currently Legislative Decree No 199/2021 (hereinafter “Renewable Energy Decree II”). It transposes into the national legal order the Renewable Energy Directive (EU) 2018/2001 (RED II). The Renewable Energy Decree II has amended Legislative Decree No 387/2003, previously amended by Legislative Decree No 28/2011 (hereinafter “Renewable Energy Decree I”).

Renewable Energy Regulation

Regulation for the renewable energy sector is structured into three types of instruments.

A set of provisions deals with territorial planning. To this end, Renewable Energy Decree II delegates the MASE to issue one or more statutory instruments (Ministerial Decrees) setting out the criteria for identifying suitable and unsuitable areas for the installation of renewable energy production plants. Based on such ministerial criteria, regional statutes identify the suitable areas.

Secondly, Renewable Energy Decree II provides for the permitting procedures. The related competence is assigned to regional authorities. Such procedures were already regulated within Legislative Decree No 387/2003 and Renewable Energy Decree I, both amended by Renewable Energy Decree II. The administrative procedures for granting renewable energy plant permits aim at ensuring proportionality, transparency and simplification. Pursuant to Article 22 of the Renewable Energy Decree II, procedures for the installation of plants in suitable areas are provided with further simplification tools. Moreover, specific provisions are devoted to the procedure for the installation of biofuel production plants.

Thirdly, a regulatory framework is provided for the financial incentivisation of the production of renewable energy.

One of the most important features of the new regulatory framework is the introduction and strengthening of organisational tools, such as the renewable energy communities. In addition, Renewable Energy Decree II rationalises pre-existing incentive instruments. The most important incentive instruments are the following.

- “Green certificates”: companies producing or importing electricity from non-renewable sources must feed into the grid an amount of energy produced by plants fuelled by renewable sources. Green certificates were introduced by Legislative Decree No 79/1999 Article 11, now replaced by a new form of incentive provided for by Ministerial Decree of 6 July 2012.
- “All-inclusive tariff” (introduced by Law No 244/2007 and amended by Law No 99/2009): unlike certificates allocated on the basis of energy produced, the tariff is recognised only for the amount of energy actually fed into the grid, excluding the portion possibly intended for self-consumption.
- “Energy account”: specifically dedicated to photovoltaic energy and introduced by Legislative Decree No 387/2003, it is based on the granting of an incentive for the amount of energy produced (therefore also self-consumption, like the green-certificates, but unlike the all-inclusive tariff).

8.2 Other Support

The Italian jurisdiction provides other regulatory instruments and support for the uptake of other forms of climate-friendly investment. In particular, national policy makers are paying attention to mobility issues and photovoltaic energy.

At a policy level, the Italian mobility strategy hinges, in line with the European Green Deal, on the development and enhancement of sustainable forms of transport, both private and public, as well as of sustainable freight logistics, in order to reduce pollutant and CO₂ emissions.

Recently, the so-called PNRR Decree 3 (Decree-Law No 13/2023) establishes an easier permitting regime for photovoltaics, identifies areas suitable for the installation of plants powered by renewable energy sources more widely and establishes a new perimeter for free building interventions and interventions without Environmental Impact Assessment (EIA) until 2024.

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